Nos. 83-997, 83-1325

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

TRANS WORLD AIRLINES, INC.,
Petitioner,

v.

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C. A. PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Respondents.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Petitioner,

v.

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C. A. PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND TRANS WORLD AIRLINES, INC.,
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On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF OF AIR LINE PILOTS ASSOCIATION, INTERNATIONAL

Petitioner in No. 83-1325
Respondent in No. 83-997

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PRELIMINARY STATEMENT

Air Line Pilots Association, International ("ALPA") submits this reply brief as petitioner in No. 83-1325 to respond to arguments by the Equal Employment Opportunity Commission ("EEOC") and private plaintiffs Thurston, Clark and Parkhill ("plaintiffs") as to the application of § 4(f)(1) of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623(f)(1). As EEOC and plaintiffs also argued in favor of the claim by petitioner Trans World Airlines, Inc. ("TWA") to shift damages to ALPA in their briefs as respondents in No. 83-997, ALPA responds to these arguments to the extent they were not previously advanced by TWA, without conceding that these parties may properly address this issue. *See, infra*, at 8-10.[1]

ARGUMENT

I. UNDER § 4(f)(1) TWA COULD RETIRE PILOTS AT AGE 60.

Congress authorized mandatory retirement in § 4(f)(1) of the ADEA, which permits an employer "to take any action otherwise prohibited" by the ADEA (except retaliation) where age is a BFOQ. 29 U.S.C. § 623(f)(1). In the face of plain language, contemporaneous administrative interpretation, and unmistakable legislative history, the EEOC argues that the phrase "any action otherwise prohibited" only describes actions which are "'reasonably necessary' to the demands of the job," so that retirement is not an action permitted by § 4(f)(1).

[1] ALPA's opening brief as petitioner in No. 83-1325 is referred to as "ALPA Pet. Br." ALPA's brief as respondent in No. 83-997 is "ALPA Resp. Br." The EEOC's and the private plaintiffs' briefs in opposition to certiorari are referred to respectively as "EEOC Br. in Opp." and "Pl. Br. in Opp." The EEOC's brief as respondent is "EEOC Br." Private plaintiffs' brief as respondents is "Pl. Br." The EEOC's recent "Reply Memorandum" in No. 83-997 is "EEOC Reply Mem."

EEOC Br. at 28-29. Plaintiffs and the EEOC further assert that forced retirement from a BFOQ job is illegal because it applies the BFOQ to other jobs. Pl. Br. at 22-23; EEOC Br. at 26-27. We respectfully submit that these arguments are without merit.

1. Section § 4(f)(1) presents two distinct questions. The first is *whether* a particular age is a BFOQ "reasonably necessary to the normal operation of the particular business." 29 U.S.C. § 623(f)(1). The phrase "reasonably necessary" is uniformly understood to be one element in deciding this issue. *See, e.g., Criswell* v. *Western Air Lines, Inc.*, 709 F.2d 544, 550 (9th Cir. 1983), *cert. granted*, —— U.S.L.W. —— (U.S. Oct. 1, 1984) (No. 83-1545). The second question is *what action* may be taken by an employer when the employee reaches the BFOQ age. Section 4(f)(1) states that an employer may then take "any action otherwise prohibited" by the ADEA. While the BFOQ may not be established unless it is "reasonably necessary," there is no such limit on the action authorized where age is a BFOQ. The EEOC's strained reading inverts the words on the statute, and reduces "any action otherwise prohibited" to mean the sole action "'reasonably necessary' to the demands of the job": that is, an employer may only remove an employee from a BFOQ job and then take any additional action *not* prohibited by § 4(a) of the ADEA. The Court has consistently declined such invitations to judicial legislation. *See* ALPA Pet. Br. at 19; *see also United States* v. *Lorenzetti*, —— U.S. ——, 104 S.Ct. 2284, 2291 (1984).

There is no dispute that TWA captains who reach age 60 are subject to a BFOQ. Under § 4(f)(1), TWA may then take the action of requiring a captain's retirement. "[I]n light of the sweeping statutory language, [the EEOC's] argument borders on the frivolous." *Regan* v.

Wald, —— U.S. ——, 104 S.Ct. 3026, 3034 n.16 (1984) (construing the phrase "any . . . transactions").

2. While ALPA has demonstrated Congress' unmistakable intent to allow mandatory retirement under § 4(f)(1), ALPA Pet. Br. at 9-11, the EEOC regards that legislative history both as "incongruous" and as irrelevant to the issue of "age-based disparities in job transfer rights." EEOC Br. at 28-29. There is nothing "incongruous" in Congressional selectivity in adopting or expanding remedial legislation.[2] Moreover, the issue here is not age discrimination in transfer rights; the seniority provisions of the Working Agreement are not age-based. EEOC Br. at 7-8, 25, n.31; Pl. Br. at 21; TWA Br. at 28, n.35; *see* A-26. Rather, the issue presented is whether captains and first officers may be retired and consequently excluded from the seniority system at age 60.[3] As to this issue, Congress plainly and unmistakably approved "mandatory retirement" as one of the actions permitted by § 4(f)(1) even if that action otherwise violates the ADEA.[4] Plainly, the EEOC may not seek

[2] In the 1978 amendments Congress retained an age ceiling (70), delayed the new upper age limit protection for tenured faculty and persons covered by collective bargaining agreements, and restricted the protection for executives covered by minimum pension terms. Pub. L. No. 95-256, § 2(b), § 3(a), 92 Stat. 189, 189-90 (1978). These actions were no less "incongruous" in the context of Congress's overall actions than was Congress's wish to protect existing practices where age is a BFOQ.

[3] *See* A-26 ("the employment practice at issue in this lawsuit [is] the severing of age 60 captains from the company"); EEOC Br. at 15 (the issue "is the forced retirement of captains and first officers at age 60, and their resulting exclusion from the seniority system"); Pl. Br. at 16-17 (attacking TWA's system of "mandatory retirement, severance of seniority rights and refusal to transfer because of age").

[4] The proposed Senate amendment to § 4(f)(1) in 1977, specifying that "any action" included "the establishment of a mandatory retirement age less than [age 70] . . . where age is a [BFOQ]," S. Rep. No. 493, 95th Cong., 1st Sess. 11, 24 (1977), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 504, 514; the 1977 House Committee Report, stating that the ADEA amendments were "not intended [to] prohibit mandatory retirement or other employment practices where age is a [BFOQ]", H.R. Rep. No. 527 (Pt. 1), 95th Cong., 1st Sess. 12 (1977); and 1978 legislative debates, ALPA Pet. Br. at 10-11, all expressed approval of mandatory retirement at an age which is a BFOQ.

judicial deference to its interpretation of § 4(f)(1) on the grounds that "Congress never specifically addressed the issue." EEOC Br. at 29-30.

When Congress enacted the ADEA in 1967, it permitted employers and unions to continue the use of existing age-based employment practices in response to disqualification by a BFOQ. Congress did *not* require the transfer or retraining of employees disqualified by age.[5] As the Court emphasized in reviewing the EEOC's challenge to Wyoming's mandatory retirement of game wardens in *EEOC* v. *Wyoming*, —— U.S. ——, 103 S.Ct. 1054 (1983), employers "remain free under the ADEA to continue to do *precisely what they are doing now*, if they can demonstrate that age is a [BFOQ] for the job. . . ." 103 S.Ct. at 1062 (emphasis in original). Indeed, in 1968, the Department of Labor ("DOL") issued interpretive regulations which acknowledged that § 4(f)(1) authorized the existing practice of compulsory retirement of airline pilots who are subject to the FAA's Age 60 Rule.[6] When Congress amended § 4(f)(2) of the ADEA in 1978 to prohibit mandatory retirement under employee benefit plans and seniority systems, it did not

[5] *See* ALPA Pet. Br. at 13. The EEOC and plaintiffs do not argue that Congress was unaware of the obvious variety of employment practices available when employees are not able to keep a job for various reasons. *Id.* at 14.

[6] 29 C.F.R. § 860.102(d), superseded in 1981 by 29 C.F.R. § 1625.6. *See* 46 Fed. Reg. 47724 (1981).

change § 4(f)(1), but rather confirmed that under present law, once a valid BFOQ is established, "an employer may lawfully require mandatory retirement at that specified age." H.R. Conf. Rep. No. 950, 95th Cong., 1st Sess. 7 (1977), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 528, 529; 123 Cong. Rec. 34,296 (1977). *See* ALPA Pet. Br. at 11.

In short, under § 4(f)(1), employers remain free to do what they had been doing prior to 1967, and were continuing to do in 1977, in retiring employees disqualified by a BFOQ. This is precisely the assurance given to this Court by the EEOC in *EEOC* v. *Wyoming*, where the agency argued that "[i]f age is a 'bona fide occupational qualification,' a[n] employer is free to impose a mandatory retirement age. . . ."[7] Neither the EEOC nor plaintiffs square their present reading of § 4(f)(1) with the 1978 Senate amendment, House Report, Conference Committee Report and floor debates—all of which confirm that mandatory retirement is precisely an action authorized by § 4(f)(1), without *any* suggestion that such action may be taken only if it is not otherwise prohibited by § 4(a) of the ADEA. ALPA Pet. Br. at 9-14.

3. Contrary to respondents' contention, mandatory retirement where age is a BFOQ does not "apply" the BFOQ to other jobs. *See* EEOC Br. at 27; Pl. Br. at 23-24. If an airline employed crew members only in positions which are subject to a BFOQ, it would still have to decide what action to take concerning captains who reach age 60: it could either place these captains on furlough pending a possible change in FAA regulations or acquisition of aircraft requiring flight engineers, or it could retire them. Either decision applies to the position subject to the BFOQ.[8] By relying on cases addressing the "job specific" nature of the BFOQ, the EEOC once again confuses the issue of establishing a BFOQ with the action which may be taken on the basis of a BFOQ. As the court observed in *Mahoney* v. *Trabucco*, 735 F.2d 35, 38 (1st Cir. 1984), a recent "job specific" BFOQ decision, "the whole idea of a BFOQ is to carve out a limited occupational field where an employer may enforce a retirement age requirement, free from the duty of making individual judgments, provided that the . . . [BFOQ is] established." However narrowly the occupational field subject to a BFOQ may be defined, § 4(f)(1) plainly authorizes mandatory retirement where age is established to be a BFOQ for a particular occupational category.

4. The EEOC requests that the Court defer to its litigation position and to DOL "opinion letters," which are contrary to the DOL's 1968 interpretive bulletin expressly acknowledging compulsory retirement as an action permitted by § 4(f)(1) and which were "effectively rescind[ed]" by the EEOC, 46 Fed. Reg. 47,724 (1981). This argument should be rejected.[9] Deference to agency interpretations "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier pronouncements, and all those

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[7] Brief of Appellant EEOC at 13-14, *EEOC* v. *Wyoming*, 103 S.Ct. 1054 (1984); *see* 103 S.Ct. at 1071 (Burger, C.J., dissenting).

[8] There is no question here about the right of age 60 former captains to apply for the flight engineer job or any other TWA position on the same basis as any other applicant. Plaintiffs do not seek jobs as applicants; they seek to use accrued seniority to secure flight engineer positions *after* they turn 60. Whether they can do so is entirely a function of the scope of the actions that the employer may take when a captain turns 60 and in no way "applies" the BFOQ to any other position.

[9] *See Donovan* v. *Burger King Corp.*, 675 F.2d 516, 522 (2d Cir. 1982) (no deference to agency litigation position). Moreover, the DOL opinion letters are ambiguous: they either require equal consideration of captains "approaching age 60," with which TWA complies, or prohibit mandatory retirement upon disqualification by a BFOQ, which is the issue in this case.

factors which give it power to persuade, if lacking power to control." *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944). *See General Electric Co.* v. *Gilbert*, 429 U.S. 125, 141-43 (1976). Where, as here, the question involves statutory construction dependent on the language of the act as well as its legislative history, deference to agency interpretations is not warranted,[10] especially if it is contrary to the plainly expressed intent of Congress.[11]

II. NEITHER THE EEOC NOR PLAINTIFFS HAVE ESTABLISHED A BASIS TO ALLOW TWA TO SHIFT ITS DAMAGES TO ALPA

A. The EEOC and Private Plaintiffs Correctly Asked This Court to Reject TWA's Claim to Shift Damages

The EEOC and private plaintiffs opposed TWA's petition for certiorari on all issues, including its effort to shift damages to ALPA. The EEOC stated that TWA's claim was "analogous to a claim for contribution" and "should be rejected." EEOC Br. in Opp. at 19. The EEOC also asserted that "ADEA defendants are jointly and severally liable for violating the Act" (rather than subject to apportionment of damages) and, as a result, the EEOC claimants "will obtain full relief from TWA." *Id.* at 19 n.16.[12]

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[10] *See, e.g., Southeastern Community College* v. *Davis*, 442 U.S. 397, 411-12 (1979); *Pittston Stevedoring Corp.* v. *Dellaventura*, 544 F.2d 35, 49 (2d Cir. 1976), *aff'd sub nom. Northeast Marine Terminal Co.* v. *International Terminal Operating Co.*, 432 U.S. 249 (1977).

[11] *See Ambook Enterprises* v. *Time Inc.*, 612 F.2d 604, 610 (2d Cir. 1979), *cert. denied*, 448 U.S. 914 (1980).

[12] Private plaintiffs agreed that any liability is joint and several, that they have no obligation to pursue a claim for damages from ALPA, that they "will now receive full relief from TWA," that TWA's claim is not properly before this Court, and that TWA was in effect seeking contribution without having raised this claim in its pleadings. Pl. Br. in Opp. at 10 & n.14, 11 & n.16.

The EEOC, in an unusual "reply memorandum," has reversed its position and now argues (1) that TWA has a right to apportionment of damages (meaning that the EEOC will *not* collect all of its money from the employer) and (2) that TWA's claim is *not* in the nature of a claim for contribution. EEOC Reply Mem. at 2-3, 4-5. As to proposition (1), the EEOC cites no authority and stands mute as to the contrary authorities on which it relied in opposing certiorari. EEOC Br. in Opp. at 19, n.16. As to proposition (2), the EEOC abandons its prior reliance on *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77 (1981), EEOC Br. in Opp. at 19, and instead attempts to distinguish *Northwest Airlines* on the basis of procedural differences between Northwest's and TWA's claims. EEOC Reply Mem. at 4-5. Yet, the question of a right to contribution as asserted by TWA is entirely a function of whether Congress has created that statutory right and, as such, does not depend on the procedural context in which the right to shift damages is asserted. ALPA Resp. Br. at 14.[13]

The EEOC also argues that the private plaintiffs and the agency may now pursue *their* claims for damages against ALPA in this Court. EEOC Reply Mem. at 3-4, n.2. This assertion squarely presents a significant issue in the administration of the Court's docket: May a respondent seek to *reverse* a partially adverse judgment where it *opposed* the petition for certiorari, informing the Court that it was satisfied with the judgment, and did *not* file either a timely cross-petition under Supreme Court Rule

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[13] Of course, the EEOC here *did* sue ALPA, and assuming that the ADEA authorized recovery of damages against ALPA, the agency could have pursued that claim. In that sense, *Northwest Airlines* and *TWA* are different cases. However, the EEOC stopped pursuing its claim, as was its right, after the Second Circuit judgment, and that is why, even procedurally, this case and *Northwest Airlines* are now in the same posture.

19.5 or a timely paper in support of the petition for certiorari under Rule 19.6.

The position advocated by the EEOC is contrary to the holding of *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 401, n.2 (1975), and related cases that "absent a cross-petition for certiorari, the respondent may not now challenge the judgment of the Court of Appeals to enlarge its rights thereunder," and would negate Rules 19.5 and 19.6. *See* ALPA Resp. Br. at 8 n.5. Accordingly, Respondents EEOC and plaintiffs have no right to enlarge a judgment from which they did not seek review in accordance with this Court's Rules.[14] Since TWA has no right to shift its damages to ALPA, ALPA Resp. Br. at 8, the judgment on this aspect of the case should remain undisturbed.

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[14] In *Director, Office of Workers Compensation Programs* v. *Perini North River Associates*, 459 U.S. 297, 103 S.Ct. 634 (1983), the Court held that a respondent, who had filed a timely brief in support of a petition for certiorari in accordance with Supreme Court Rule 19.6 and a brief on the merits in support of the position taken by the petitioner, could seek reversal of an adverse judgment. 103 S.Ct. at 640-41. The significance of *Perini*, therefore, is that a timely Rule 19.6 filing is, for these purposes, equivalent to a timely petition or cross-petition for certiorari. In *O'Bannon* v. *Town Court Nursing Center*, 447 U.S. 773, 783-84 n.14 (1980), the Court reasoned that the HEW Secretary, automatically joined as a respondent under former Rule 21(4), could "[i]n that capacity seek reversal of the judgment of the Court of Appeals." The Court obviously meant that the Secretary could do so in the capacity of a respondent who "support[s] the position of the petitioner" within this Court's Rules (otherwise, of course, no "respondent" would ever have to file a petition to secure a reversal). Indeed, the Court held that the Secretary of HEW could not secure review of the propriety of the payment order because he "did not file a petition for certiorari." 447 U.S. 783 n.14. Moreover, the issue pursued by TWA (its effort to *shift* damages to ALPA) is not the same issue as EEOC's claim (to *secure* damages from ALPA), *see Northwest Airlines, Inc.*, 451 U.S. at 88 n.20, and EEOC and plaintiffs *opposed* the petition for certiorari in papers filed beyond the mandatory 20-day limit of Rule 19.6.

The recent decision of the Second Circuit in *EEOC* v. *CBS, Inc.*, 35 Fair Empl. Prac. Cas. (BNA) 1127 (2d Cir. 1984), poses an additional obstacle to review. The court in *CBS* held that the transfer of ADEA enforcement authority from the Department of Labor to the EEOC was unconstitutional.[15] As the court below in the present case held that "ALPA is liable under 29 U.S.C. § 623(c)(3) to the EEOC plaintiffs who were damaged by its conduct" A-33,[16] any decision by this Court con-

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[15] *But see Muller Optical Co.* v. *EEOC*, 35 Fair Empl. Prac. Cas. (BNA) 1147 (6th Cir. 1984); *EEOC* v. *Hernando Bank, Inc.*, 724 F.2d 1188 (5th Cir. 1984).

[16] The judgment below "directed that each plaintiff be awarded such relief as he was entitled to against each defendant *in accordance with this opinion*, after such evidentiary hearing as may be necessary for that purpose." A-35, 39 (emphasis added). The opinion expressly limited ALPA liability "under 29 U.S.C. § 623(c)(3) to the *EEOC plaintiffs who were damaged by its conduct.*" A-33 (emphasis added). Plaintiffs have not sought review of this adverse judgment in this Court. *See, e.g., United States* v. *Reliable Transfer Co.*, 421 U.S. at 401 n.2.

All three private plaintiffs and four of the EEOC claimants retired prior to "ALPA's actions in signing the post-1978 Working Agreements [executed in July, 1979 (J.A. 147, 337-38)] and in causing TWA to implement other restrictions on the downbidding older captains. . . ." A-33 n.19. The EEOC admits that these additional restrictions were not adopted until 1980. EEOC Br. at 9. These seven claimants (inculding all private plaintiffs) were not damaged by any conduct of ALPA, *see* ALPA Resp. Br. at 4 n.4.

Plaintiffs and the EEOC argue that ALPA monetary liability to captains retired prior to July, 1979, should be based on the *ALPA* v. *TWA* lawsuit filed August 10, 1978; ALPA contract proposals made in August, 1978; and meetings between ALPA and TWA in the summer of 1978. EEOC Br. at 56; Pl. Br. at 11-13. These assertions are unsupported by the record.

- The Second Circuit expressly declined to consider whether ALPA's filing *ALPA* v. *TWA* violated the ADEA. A-33 n.19.
- ALPA's August 24, 1978, contract proposals, made under § 6 of the RLA (J.A. 244, ¶ 14), were immediately rejected by TWA as premature (*id.*, ¶ 15); ALPA refused to discuss these pro-

cerning union liability would be purely advisory under governing Second Circuit decisional law.[17]

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posals except under § 6 procedures (J.A. 245, ¶ 16); when ALPA made timely proposals to amend the 1977 agreement, items relating to working past age 60 were *not* included. J.A. 158-161. Indeed, the Second Circuit affirmed summary judgment in *ALPA* v. *TWA* on the grounds, *inter alia*, that ALPA "failed to negotiate over TWA's retirement policy for flight engineers" in 1979 and 1982. A-15.

- The Second Circuit determined that ALPA *unsuccessfully* opposed TWA's change in policy and did *not* find that ALPA played any role in TWA's shift between the July, 1978, Crombie letter and the August, 1978, bulletin. Rather, the Court found that "TWA unilaterally issued" the August, 1978, bulletin, A-9. TWA does not dispute this. The EEOC's explanation is that Frankum, who replaced Crombie in developing age-60 policy, "did not agree with Crombie's July 19th letter"; "disavowed [that] letter and . . . proceeded from there"; and "caused TWA to issue" the August bulletin. EEOC Br. at 6. Frankum did not receive any response from or discuss the matter with ALPA. Frankum Tr. at 206; J.A. 100 5A. Another TWA official stated that ALPA "had no impact at all" on the formulation of the August, 1978, bulletin. J.A. 1050-52. The EEOC's references to meetings between ALPA and TWA in the summer of 1978 are inapposite: the statements made at J.A. 1041-1049 were disavowed during cross-examination, Hilly Tr. 2/10/82 at 138; ALPA's opposition, on BFOQ grounds, to service past age 60 by any flight engineer (J.A. 1050-56), was known to TWA *prior to* Crombie's letter (J.A. 1055).

[17] The EEOC alleged jurisdiction under 28 U.S.C. §§ 451, 1337, 1343 and 1345. J.A. 92. As the EEOC is not "authorized to sue" by a constitutional "Act of Congress" to enforce the ADEA, 28 U.S.C. §§ 451 and 1345 are inapplicable. *See Reed* v. *County Commissioners of Delaware County*, 277 U.S. 376 (1928). As § 7(b) of the ADEA specifically vests enforcement authority in the Department of Labor, not the EEOC, the general jurisdictional grants in 28 U.S.C. §§ 1337 and 1343 add nothing to the power of the federal district courts to entertain an ADEA action by the EEOC. Moreover, absent authority to enforce the ADEA, the EEOC would lack standing to present those issues to the Court. *See generally, Director, Office of Workers Compensation Programs* v. *Perini North River Associates*, 459 U.S. at 304-305.

B. Neither the EEOC Nor Private Plaintiffs Provide Convincing Reasons to Reverse the Second Circuit on Union Damages

1. The EEOC and private plaintiffs seek to obtain legal relief against unions which violate the ADEA. Yet the EEOC concedes that the enforcement mechanism of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-219, was explicitly incorporated in the ADEA, and that the latter statute "is to be enforced under the FLSA. . . ." EEOC Br. at 31 n.35. The EEOC further admits that § 16(b) of the FLSA, as incorporated in the ADEA, only "authorizes employees to sue their *employer* for back pay and liquidated damages." EEOC Br. at 43 (emphasis added). As § 16(c) provides a representative suit to obtain only the relief provided under § 16(b), ALPA Resp. Br. at 22-23, the government also may obtain legal relief only from an "employer." The EEOC's and plaintiffs' reliance on the general "legal or equitable relief" language in § 7(b) of the ADEA is misplaced, as these terms do not provide additional legal remedies for "amounts owing" beyond what is authorized by incorporated FLSA remedies. *See* ALPA Br. at 31-32.

Plaintiffs seek to justify legal relief against unions by reading language in § 7(b), which deems a violation of § 4 of the ADEA to be a violation of § 15 of the FLSA, as also intended to make violations of § 15 by "any person" to be "employer violations of FLSA Sections 6 and 7 . . . actionable under FLSA Section 16(b) . . . ." Pl. Br. at 39. This construction of § 7(b) of the ADEA and §§ 15 and 16 of the FLSA is contrary to the terms of both statutes. While § 15 prohibits violations by "any person," defined in FLSA § 3(a) to cover labor organizations, § 16(b) only provides for recovery of "unpaid minimum wages or . . . unpaid overtime compensation" and liquidated damages from an "employer," expressly defined in FLSA § 3(d) to exclude labor organizations.[18]

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[18] Congress amended § 16(b) in 1977 to provide legal and equitable remedies against "any employer" which retaliates, Pub. L. No.

By deeming a § 4 violation to be a § 15 violation, and by deeming "amounts owing" to be "unpaid minimum wages and overtime compensation" in § 7(b) of the ADEA, Congress provided that an FLSA § 3(d) "employer" would be responsible for payment of "amounts owing," and both employers and labor organizations would be subject to such injunctive relief as is available in government enforcement actions under § 17 of the FLSA.

2. The EEOC and plaintiffs also argue that § 17 of the FLSA and § 7(c)(1) of the ADEA provide an *equitable* back pay award against unions. Yet, § 17 has been construed to provide monetary relief against employers, not unions. *See* ALPA Resp. Br. at 26. Moreover, the decision in *Lorillard* v. *Pons*, 434 U.S. 575 (1978), that the ADEA provides a statutory right to a jury trial was based on this Court's determination that the *exclusive* remedy for "amounts owing" in a private ADEA action is the "legal relief" provided in § 16(b) of the FLSA, as incorporated in the ADEA, rather than the "equitable relief" provided in § 17 of the ADEA.[19]

95-151, 91 Stat. 1245 (1977), even though § 15(a)(3) prohibits retaliation by "any person," and prior decisions had construed the "employer" language in § 16(b) not to apply to labor organizations which violated § 6(d)(2), § 15(a)(2) or § 15(a)(3) of the FLSA. *See* ALPA Br. at 25-26.

[19] In *Lorillard*, this Court found that Congress had adopted decisional law construing § 16(b) of the FLSA to confer a right to a jury trial: (1) by incorporating § 16(b) in the ADEA, 434 U.S. at 580-81 & n.7; and (2) by directing that actions for wages lost as a result of an ADEA violation are to be treated as actions for "unpaid minimum wages or overtime compensation" under the FLSA, 434 U.S. at 582. Even though § 17 of the FLSA expressly authorized an equitable back pay remedy, 434 U.S. at 580 n.7, and § 17 equitable relief was available "in any action" under the ADEA, *id.* at 581, this Court determined that decisional law construing § 17 not to provide for jury trials did *not* apply to a private employee action for reinstatement and unpaid wages. *Id.* at 580 n.7. *See Morelock* v. *NCR Corp.*, 546 F.2d 682 (6th Cir. 1976), *vacated and remanded*, 435 U.S. 911 (1978).

The argument that § 7(c)(1) of the ADEA authorizes appropriate "legal or equitable relief" in addition to the remedies provided in § 7(b) of the ADEA is similarly foreclosed by *Lorillard*. The terms "legal or equitable relief" do not provide a basis to determine whether the ADEA provides a right to a jury trial, since a private action for unpaid wages may equally be characterized as seeking "legal relief" or an "equitable" back pay award. The only reading of § 7(c)(1) consistent with *Lorillard* is that it creates a private cause of action to obtain the remedies provided in § 7(b) of the ADEA. *See* ALPA Resp. Br. at 17 n.20.

While Congress expressly modified FLSA procedures and remedies in § 7(c)(1) to provide that "any person aggrieved" (in contrast to "one or more employees," 29 U.S.C. § 216(b)) may bring an action, and in § 7(b) to authorize equitable remedies "in any action," there is no provision in the ADEA which deems "any person" who violates § 4 to be an FLSA "employer," or otherwise provides a remedy against labor organizations for "amounts owing" as a result of a violation of the ADEA. As this Court emphasized in *Lorillard*:

> "The selectivity that Congress exhibited in incorporating provisions and in modifying certain FLSA practices strongly suggests that but for those changes Congress expressly made, it intended to incorporate fully the remedies and procedures of the FLSA."

434 U.S. at 582. Whatever power a court may have to order equitable monetary relief under § 7(b) where a union interferes with the enforcement of the Act,[20] or

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[20] *See Hodgson* v. *Sagner, Inc.*, 326 F. Supp. 371 (D. Md. 1971), *aff'd sub nom. Hodgson* v. *Baltimore Regional Joint Board*, 462 F.2d 180 (4th Cir. 1972). The EEOC's suggestion that *Sagner* "held that unions are subject to back pay liability as an equitable remedy when they violate Section 6(d)(2) of the [Equal Pay Act]," EEOC Br. at 46-47 n.52, is far different from its analysis of § 17 and *Sagner* in *Northwest Airlines*, where it argued that remedies for union violations of § 6(d)(2) and § 15(a)(2) of the FLSA are

as a substitute for the equitable remedy of reinstatement, *see, e.g., Whittlesey* v. *Union Carbide Corp.*, 35 Fair Empl. Prac. Cas. (BNA) 1089, 1091-92 (2d Cir. 1984), there is no statutory basis to supplement the exclusive remedies that Congress provided to recover "amounts owing" for ADEA violations.[21] *Cf. Northwest Airlines*, 451 U.S. at 93-94.

3. The EEOC argues that Congress merely incorporated the language of FLSA §§ 16 and 17 into the ADEA, but not the policy choices embodied in the remedial scheme of the FLSA, because the elimination of an unfair method of competition is not an express "purpose" of the ADEA. EEOC Br. at 46. This distinction in "purpose" is irrelevant to the scope of the statute's remedial goal of providing restitution to plaintiffs injured by statutory violations. Indeed, the EEOC argues that liquidated damages under the ADEA "should be deemed to serve the compensatory purpose this Court recognized in the FLSA provisions from which they were taken." EEOC Br. at 37. It may similarly be assumed that Congress was aware that the FLSA enforcement scheme was designed to deter employer violations, EEOC Br. at 46, when it adopted FLSA rather than Title VII remedies, especially where legislative history only addresses age-based employment practices by *employers*.[22] In this con-

injunctive relief and, "in flagrant cases [e.g., *Sagner*] . . . [a] commission suit for damages." Brief of EEOC at 18, *Northwest Airlines*, 451 U.S. 77. *See* ALPA Resp. Br. at 28-29 & n.37.

[21] Contrary to plaintiffs' argument, Pl. Br. at 34-35, the express backpay remedy provided in § 706(g) of Title VII, 42 U.S.C. § 2000e-5(g), cannot serve as a basis for judicial implication of a similar ADEA remedy. *See Lorillard* v. *Pons*, 534 U.S. at 584.

[22] As the EEOC acknowledges, the primary purpose of the ADEA was to rectify discrimination "understood to result not from malice or intolerance, but from unfounded assumptions and ignorance regarding the abilities of older workers." EEOC Br. at 35. The evidence before Congress overwhelmingly addresses this problem in terms of *employer*, not labor organization, discrimination. *See*

text, the EEOC's additional argument, EEOC Br. at 46, that "the employer gains no economic benefit from its own or the union's discrimination against older workers" is simply astonishing. *See EEOC* v. *Wyoming*, —— U.S. ——, 103 S.Ct. 1054, 1070 (1983) (Burger, C.J., dissenting) (taking judicial notice of higher costs of employing older workers).[23]

4. While the EEOC strains to draw inferences from unrelated portions of the legislative history of the 1967 Act, EEOC Br. at 45-46, neither the Senate Report's characterization of § 10 of the Portal-to-Portal Act,[24]

ALPA Resp. Br. at 40-41 n.53. An AFL-CIO representative testified that unions had not engaged in age discrimination, *Age Discrimination in Employment: Hearings on S. 830 and S. 788 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 90th Cong., 1st Sess. 95, 97-98 (1967) (hereinafter "*Senate Hearings*"); neither the EEOC nor plaintiffs have pointed to any evidence of union age discrimination before Congress in 1967. Where Congress considered union conduct to be a substantial problem, as it plainly had a basis to do in Title VII, *see* ALPA Resp. Br. at 40 n.53, it expressly provided monetary remedies against unions, *see, e.g.*, 42 U.S.C. § 2000e-5(g).

[23] Congress adopted § 4(a)(3) of the ADEA *in haec verba* from § 6(d)(1) of the Equal Pay Act, based on AFL-CIO recommendations and testimony concerning *underpayment of older workers. Age Discrimination in Employment: Hearings on H.R. 3651, H.R. 3768, and H.R. 4221 Before the General Subcomm. on Labor of the House Comm. on Education and Labor*, 90th Cong., 1st Sess. 412, 418 (1967) (Statement of Kenneth Meiklejohn, Legislative Rep., AFL-CIO) (hereinafter "*House Hearings*"); *Senate Hearings* at 101 (Statement of Andrew J. Biemiller, Legislative Director, AFL-CIO). *See, e.g., EEOC* v. *Westinghouse Electric Co.*, 725 F.2d 211 (3d Cir. 1983) (denying older workers benefits provided to younger employees); *Geller* v. *Markham*, 635 F.2d 1027 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981) (refusing to hire more expensive older workers).

[24] Section 10 of the Portal-to-Portal Act provides that "no employer shall be subject to any liability or punishment" if it complies in good faith with certain administrative regulations, and that this "defense, if established shall be a bar to the action or proceeding" in which liability is sought. 29 U.S.C. § 259(a).

nor statements made by AFL-CIO representatives[25] support the suggestion that Congress intended to provide monetary remedies against unions. The Senate Committee Report statement that § 10 is available to an "employer, employment agency or labor organization" as "a valid defense against a suit under this act," S. Rep. No. 723, 90th Cong., 1st Sess. 10 (1967), simply extends the reach of a § 10 defense to the full extent of the conduct prohibited by § 4 of the ADEA, without any distinction between suits for equitable relief and suits for money damages. Moreover, even assuming that § 10 was intended "to give protection from money judgments" and "does not affect prospective injunctive actions,"[26] EEOC Br. at 46, Congress may have intended § 10, as incorporated in the ADEA, to insulate defendants from the economic burdens of non-monetary, equitable remedies for past discrimination, *e.g.*, constructive seniority, restoration of pension rights, or affirmative action in promotions or training.[27] While Congress denied an AFL-CIO request to remove unions entirely from the coverage of the Act, there is no logical basis to infer an intent to vary the incorporated provisions of the FLSA, which

[25] The AFL-CIO proposed an amendment to have the ADEA enforced under the remedies and procedures provided in the FLSA, *Senate Hearings* at 101; this proposal is substantially similar to § 7(b) as adopted by Congress. The EEOC's argument, EEOC Br. at 45, that FLSA enforcement procedures were not "of critical importance" to the AFL-CIO, is based on a colloquy between Rep. Hawkins and AFL-CIO representative Mieklejohn, in which the AFL-CIO took the position that whether the Wage and Hour Division or a separate bureau in the Department of Labor should enforce the ADEA is not "of critical importance." *House Hearings*, at 420-21.

[26] The Sixth Circuit Court of Appeals has squarely held that a § 10 defense, if established, precludes both equitable as well as legal liability based on this statutory language. *Marshall* v. *Baptist Hospital, Inc.*, 668 F.2d 234, 238-39 (6th Cir. 1981).

[27] *See, e.g., General Building Contractors Association, Inc.* v. *Pennsylvania*, 458 U.S. 375, 102 S.Ct. 3141, 3154-55 (1982).

prohibit certain union conduct, 29 U.S.C. § 215(a)(2), (3).[28]

5. The ultimate absurdity of the arguments made by the EEOC and plaintiffs is revealed in their requests to have this Court award liquidated damages against ALPA. As a procedural matter, it is inappropriate to request that this Court decide the factual question whether ALPA's asserted violations were willful.[29] As a substantive matter, the arguments for liquidated damages are even more strained than the requests for "amounts owing."

[28] In testimony to the Senate Committee in March, 1967, AFL-CIO representative Biemiller requested deletion of the Act's application to unions based on the absence of union age discrimination, and a concern that the Act's record keeping requirements would be onerous for local unions. *Senate Hearings* at 98. That request was not made to the House Committee during representative Mieklejohn's testimony on August 17, 1967. *House Hearings* at 412, 418.

[29] The Second Circuit did *not* find conduct by ALPA to be a "willful" violation of the ADEA, since, in its initial decision, it held that only equitable back pay, rather than legal and liquidated damages, could be recovered against unions. A-34. In *Pullman-Standard* v. *Swint*, 456 U.S. 273, 102 S.Ct. 1781, 1790 (1982), this Court held that the issue of "discriminatory intent" under § 703(h) of Title VII, 42 U.S.C. § 2000e-2(h) "is a finding of fact to be made by the trial court." Where "a district court has failed to make a finding because of an erroneous view of the law, the usual rule is that there should be a remand for further proceedings to permit the trial court to make the missing findings. . . ." 102 S.Ct. at 1791 Similarly, "willfulness" is a finding of fact to be made by the district court in the event that this Court finds that the ADEA provides for liquidated damages against unions.

Moreover, the specific "evidence" of willfulness presented by plaintiffs is specious. *See* Pl. Br. at 42. ALPA's declaratory judgment action was *not* considered as a basis for liability, A-33 n.19; what ALPA has or has not done in representing pilots employed by airlines other than TWA is irrelevant, and utterly without foundation in this record; ALPA's alleged admission "that [*ALPA* v. *TWA*] is motivated by economic, not just safety concerns" consisted only of bringing to the attention of the Court below the economic impact of TWA's 1978 change in policy. *See* A-17, n.11.

The EEOC acknowledges that liquidated damages against unions are not available in § 16(b) employee actions, but offers no justification for broader remedies in § 16(c) government enforcement actions. The "legal or equitable relief" language of § 7(c) does not authorize the extraordinary remedy of double damages, *see* ALPA Br. at 36-37; § 17 of the FLSA has uniformly been construed not to authorize liquidate damages. *Id.* at 29-30. Even if the policies of Title VII could serve as a basis for union monetary liability in an ADEA action, Title VII makes no provision whatsoever for liquidated damages. Neither the EEOC nor plaintiffs cite any authority for an award of liquidated damages against labor organizations under the ADEA, nor provide any other basis for judicial imposition of this extraordinary relief.

CONCLUSION

For the foregoing reasons, the judgment of the Second Circuit should be reversed insofar as it holds that ALPA and TWA have violated the ADEA, or in the alternative, that portion of the judgment which holds that ALPA is not liable for damages should not be disturbed.

Respectfully submitted,

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